UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

J.B. HUNT TRANSPORT, INC.

5-CA-105339

and

REGINALD DOUGLAS, An Individual

Shannon Rodgers, Esq., for the General Counsel. Alan I. Model, Esq., Littler Mendelson, P.C. Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on November 21-22, 2013. Reginald Douglas filed the charge in this matter on May 17, 2013 and the General Counsel issued the complaint on August 29, 2013.

The complaint alleges that Respondent terminated Reginald Douglas on March 13, 2013 because he engaged in protected concerted activity. Douglas' protected activity, according to the complaint was "concertedly complaining about breaks on or about March 12 and 13." The complaint also alleges that Respondent interrogated employees about their protected concerted activities and threatened to discharge them because they engaged in these activities. All these allegations are pled to be violations of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

J. B. Hunt Transport, Inc., the Respondent, is a trucking company. It has a facility in Chantilly, Virginia at which it receives appliances such as washers and dryers, primarily from a facility in Carlisle, Pennsylvania. Respondent's employees unload these appliances from large tractor-trailers. Afterwards, they load the appliances onto smaller trucks for delivery to customers, many of whom are building contractors.

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Respondent derives gross revenues in excess of \$50,000 from the transport of appliances to Chantilly from points outside the State of Virginia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel's allegations of statutory violations rest almost exclusively on the uncorroborated, but uncontradicted testimony of discriminatee Reginald Douglas. For the reasons set forth below, I decline to credit his testimony on material matters because it is generally incredible. Joshua Aussems, Respondent's former account manager, is the only person who was in a position to contradict Douglas' testimony on these matters. Since Respondent terminated Aussems' employment for performance issues shortly after it terminated Douglas, an adverse inference cannot be drawn from Respondent's failure to call Aussems as a witness, *Goldsmith Motors Corp.*, 310 NLRB 1279 fn. 1 (1993). There is no reason to assume that Aussems would be favorably disposed to Respondent.

Respondent's facility in Chantilly, Virginia is what it calls a cross-dock operation. Appliances such as washing machines and dryers are brought to the Chantilly warehouse in tractor-trailer trucks. An employee or employees, with the title of material handler, scans the contents of the tractors. Then that employee alone or with helpers off loads the appliances and reloads them on smaller trucks for delivery to customers, or moves the appliances to a staging area. All this work is done at night. A great majority of the appliances are manufactured by the Whirlpool Corporation and are shipped to Chantilly from a facility in Carlisle, Pennsylvania. Although some appliances ultimately go to individual consumers, most go to builders for installation in new homes or developments. Appliances from the Chantilly warehouse are generally not shipped to retail stores. Chantilly is part of what Respondent calls its "Final Mile" service operation.

J.B. Hunt hired the Charging Party, Reginald Douglas, as a material handler, in late

August 2012. At that time there were two other Hunt employees working with Douglas as
material handlers. By January 1, 2013 neither of the other two employees was still working for
J.B. Hunt. Reginald Douglas was thus the only material handler at the facility. He was aided by
2-4 workers at least nominally employed by Bright Sky Group, a temporary employment agency.
After January 1, 2013, Douglas was primarily responsible for scanning the appliances on the
trailers and insuring that they were loaded onto the correct delivery truck. He was primarily
responsible for insuring that the customers received the appliances that they were expecting.

Between January 1, 2013 and his termination on March 13-14, 2013, Douglas reported to Joshua Aussems, Respondent's account manager. Aussems was assisted by Nicholas Schooley, an operations supervisor.

¹ I also decline to credit the testimony of Bright Sky employees Ray Lespier and Juan Davis to the extent that their testimony supports the allegations of the complaint. Both witnesses were inconsistent as to whether employees were allowed breaks during their shifts. Also they both testified that Josh Aussems interrogated them about a statement they signed for Reginald Douglas about the lack of breaks. There is no such statement.

In mid-February 2013, Matthew Melcher, was transferred to Hunt's Final Mile Services operation, which at that time gave him responsibility for the Chantilly warehouse. Melcher received numerous complaints regarding the operation of that warehouse. As a result, Respondent transferred client manager Amber Hanchak to oversee the Chantilly warehouse. Hanchak made an initial visit to the Chantilly facility on or about February 19, Tr. 296. Hanchak began working exclusively at Chantilly on about March 1. One of the issues at the warehouse was "misloads." Misloads are appliances that are either not delivered when they are supposed to be delivered or delivered to the incorrect customer.

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Amber Hanchak switched Nick Schooley from the day shift to the night shift to rectify some of the problems at the Chantilly facility. No later than Sunday, February 24, 2013, Respondent, by Nick Schooley, advised Douglas that there were problems with the loading of the delivery trucks, R Exh. 5, Tr. 74, 259-63.

Later, Hanchak assigned Account Manager Josh Aussems to work the night shift. Previously, Aussems had only worked the day shift. According to Reginald Douglas, Aussems started working at night on about Monday, March 4, 2013. However, the record indicates that Aussems may not have started on the night shift, or alternatively did not begin supervising the loading dock, until about March 11-12 (Monday night to Tuesday morning).

According to Douglas, on the March 11-12 night shift, Aussems refused to allow him or the Bright Sky employees to take any breaks. Douglas says he complained to Aussems about this several times and that Juan Davis, a Bright Sky employee, also complained about the lack of breaks. Assuming this is so, there is no evidence that Reginald Douglas engaged in any protected concerted activity prior to the night of March 11-12.² Davis testified that he did take a break to smoke that night, which is one of many things that undercuts Douglas' credibility.

During the night of March 11-12, Aussems told the Bright Sky employees that he would like to punch Douglas in the face. These employees reported this remark to Douglas, Tr. 29-30, 131-32.

On the morning of Tuesday, March 12, Douglas asked 3 Bright Sky employees, Juan Davis, Ray Lespier and Bryan Loza to sign and date a blank sheet of legal size paper.³ They did so. Later Douglas wrote what I would call a memorandum for record (MFR) on this piece of paper, G.C. Exh.-2. The MFR does not mention Douglas or anyone else asking for breaks, or Aussems refusing to give employees breaks. It covers the following topics: 1) that Aussems tried to catch Douglas sleeping on the job; 2) that Aussems told the Bright Sky employees that he was trying to catch Douglas sleeping on the job; 3) that Aussems asked Douglas to work in the warehouse instead of the office; 4) that Aussems commented adversely on Douglas' attitude; 5)

² Douglas' testimony is rather imprecise as to when he first complained about the lack of breaks to Aussems. The record strongly indicates that his complaints and termination occurred within a period of 2-3 days. There is no basis for concluding that Douglas engaged in protected activity during the prior week. Indeed, the complaint alleges that his protected concerted activity occurred on or about March 12 and 13

³ Douglas' credibility is undercut by the fact that he testified that the three Bright Sky employees signed G.C. 2 as it appears in this record. Davis and Lespier testified that the paper that they signed was blank.

that Aussems blamed Douglas for the fact that he was working longer hours and working the night shift and 6) that Aussems had told the Bright Sky employees that he should have knocked Douglas out and then fired him.

Douglas testified that he called a woman named Julie in Respondent's human resources office and complained that Aussems was creating a hostile work environment and not allowing employees to take breaks. He also testified that he called Regional Manager Matthew Melcher and Tyler Anderson, a general manager, leaving them a message that Aussems was creating a hostile work environment. He did not testify that he mentioned the break issue to either in his voice mail messages. Moreover, in an August 2, 2013 affidavit, Douglas stated he did not go into any specifics regarding his problems with Aussems when he left a voice message for Tyler Anderson. This is another reason I am unwilling to find Douglas to be a credible witness. Douglas did not speak in person with either Melcher or Anderson until after he was terminated by Aussems.

Douglas worked from 10:08 p.m. to 8:20 a.m. March 12-13 (Tuesday-Wednesday morning). On the evening of Wednesday, March 13, Douglas reported to work at 9:52 p.m. When he arrived, Nick Schooley sent Douglas to scan appliance products in the warehouse. Within an hour or two, Josh Aussems arrived at the warehouse and summoned Douglas to his office

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Aussems told Douglas that it was Douglas' fault that Aussems had been required to work on the night shift. Aussems also said he was supposed to fire Douglas two weeks previously. He then asked Douglas for the keys to the warehouse and ordered him off Respondent's property. Douglas clocked out just before midnight, March 13-14. A few days later, Respondent also terminated the employment of Account Manager Joshua Aussems.

Analysis

In order to establish that an employer violated Section 8(a)(1) in discharging or disciplining an employee, the Board generally requires the General Counsel to make an initial

⁴ Matthew Melcher testified that he told Aussems to terminate Douglas on Friday, March 8. Although this is self-serving, it is also consistent with what Melcher told Douglas when he spoke to him immediately after Douglas' termination. Anderson also told Douglas he was terminated for performance issues immediately after Douglas' termination. While Respondent's testimony may be self-serving, it is entirely consistent and fairly consistent with Douglas' testimony. This case does not show that Respondent ever propounded shifting reasons for Douglas' termination, a factor that is often relied upon in determining discriminatory motive.

Respondent's internal communications, R Exh. 7 show that it was considering disciplinary action against Chantilly employees as early as March 3, as part of its action plan to improve the performance of the Chantilly warehouse.

⁵ The General Counsel at page 32 of his brief states Aussems did not tell Douglas that he was terminated on March 13. However, by telling Douglas that he was told to terminate him two weeks prior and then demanding Douglas' keys, I conclude that Aussems effectively informed Douglas that he was being terminated.

⁶ Douglas testified that Bright Sky employee Juan Davis complained to Aussems about employees not getting a lunch break on the evening that Douglas was terminated, Tr. 42. Davis testified that he did not speak with Aussems that night, Tr. 173. I do not credit Douglas' testimony in this regard.

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showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision.

Once the General Counsel has made an initial showing of discrimination, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and animus are often established by indirect or circumstantial evidence.

In this case the evidence supporting all the elements of the General Counsel's case is very weak. It rests almost entirely on the uncorroborated testimony of discriminatee Douglas. I find him to be generally incredible. For example, the fact that Douglas' memorandum does not mention his complaints about breaks leads me to conclude his conflicts with Aussems were related to other issues; such as Aussems' belief that he was being replaced by Hanchak or demoted on account of Douglas' job performance. To the extent that the General Counsel relies on the issues mentioned in the memo, I conclude that these issues were not concerted. They involved only personal grievances between Aussems and Douglas.

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Similarly, Douglas testified that he complained to Tyler Anderson and Matthew Melcher that Aussems was not giving employee breaks. However, on cross-examination, he conceded that he did not make such complaints to either manager prior to his termination, Tr. 110-115. Thus, the General Counsel has not met his burden of proving that Douglas engaged in protected activity, let alone that Respondent was aware of this activity and bore animus towards Douglas as a result.

What is clear is that Joshua Aussems bore a great deal of animus towards Douglas for other non-discriminatory reasons. However, what really matters in this case is the absence of any evidence that would allow a reasonable person to draw an inference that Douglas' discharge was related to any protected activity in which he might he have engaged.

Respondent was clearly very unhappy about the management of the Chantilly warehouse. The transfer of Amber Hanchak to Chantilly and Respondent's internal communications establishes this fact and that the concerns became acute about one month before Douglas' termination. It is clear from Nicholas Schooley's uncontradicted testimony that Respondent held Douglas partially responsible for the misloads long before he allegedly engaged in protected concerted activity. Thus, there is no reason to question Respondent's evidence that Douglas was fired for performance reasons. This is particularly true since it fired Aussems for the same reasons shortly thereafter. I credit Matthew Melcher's testimony that Douglas was fired for poor performance. Moreover, I find that Respondent would have terminated Douglas for this reason even if he had complained about breaks to Aussems just prior to his discharge.

Douglas' testimony, that Aussems told him that he had been ordered to fire Douglas "two weeks ago," corroborates Respondent's evidence that Douglas's discharge had no relationship to any protected activity. I find that the General Counsel had not met its initial burden of showing a relationship between protected activity and Douglas' discharge.

There is no credible evidence in the record supporting the allegations in complaint paragraphs 7 and 8. These allege that Joshua Aussems interrogated employees about their protected activities and threatened them with discharge for engaging in these activities. Bright Sky employees Ray Lespier and Juan Davis testified that Aussems interrogated them and threatened them about signing a paper complaining about the lack of breaks, Tr. 139, 174-75. The only paper Lespier and Davis signed did not mention the break issue, G.C. Exh. 2. Thus, I do not credit their testimony.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The complaint is dismissed.

Dated, Washington, D.C., February 5, 2014

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Arthur J. Amchan Administrative Law Judge

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.